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NO. 04-101

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, PH.D., Secretary, DOC; DAVID DiGUGLIELMO, Superintendent, SCI-Graterford; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Petitioners

v.

ARNOLD HOLLOWAY,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY

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ARGUMENT IN REPLY

The central issue in this case is simply stated: The Third Circuit should have deferred to the state court's resolution of the Batson[1] issue. The Pennsylvania Supreme Court examined and rejected Holloway's Batson claim on collateral review in 1999. Under the federal habeas statute, that decision is owed deference. See 28 U.S.C. § 2254(d). The Third Circuit, however, refused to defer.[2] As explained in the *Petition*, this was clearly wrong, because nothing in the state court's decision was contrary to, or an unreasonable application of, Batson.

Holloway's response takes an entirely different approach. He effectively ignores the deference issue, and barely acknowledges the state court's decision at all.[3]

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[1] Batson v. Kentucky, 476 U.S. 79 (1986).

[2] This is not an isolated error – courts in this Circuit have refused to defer to state courts' rejection of Batson claims in other cases as well. See, e.g., Hardcastle v. Horn, 368 F.3d 246 (3d Cir. 2004), petition for *certiorari* filed, No. 04-448 (U.S.).

[3] Holloway buries his short discussion of the state court's analysis near the very end of his response. See *Response* at 28. Even there, he does not actually address the deference question; he simply says the state court's ruling was "inconsistent" with Batson. He never cites the "contrary to, or … unreasonable application of" language of 28 U.S.C. § 2254(d), even in this section of his brief.

Instead, he engages in classic misdirection. He chops the Third Circuit's decision into many small, separate issues, and argues that the Commonwealth should have framed a separate *certiorari* request for every different part of the legal maze he has constructed. He also insists on litigating, one more time, the merits of the Batson claim – never mentioning that, in addition to the state court's rejection of the claim, the district court considered and rejected these same arguments, again demonstrating that the state court's rejection of the claim, based on a lesser, inadequate record which Holloway failed to develop, was reasonable.

Holloway's approach ignores common sense – it is as if he has not read the *Petition* to which he responds. Most remarkably, Holloway repeatedly insists that the Commonwealth does not challenge the Third Circuit's decision to review the Batson claim *de novo*. This is absurd. Of course the Commonwealth challenges the lack of deference – that is the whole point. As stated in the *Petition*, "[t]he only question here is whether the state court's rejection of the Batson claim was contrary to, or an unreasonable application of, this Court's Batson decisions." *Petition* at 13. The Third Circuit failed to abide by this standard, and that is the focus of the Commonwealth's challenge. The panel offered several reasons for not deferring to the state court's decision -- most importantly, the court held that Pennsylvania's record-preserving requirement for Batson claims is unconstitutional (App. 37-45), and that the Batson claim had been exhausted on direct appeal (App. 14-22). In the *certiorari* petition, the Commonwealth challenges both of these arguments. See *Petition* at 7-17 (Pennsylvania record-making requirement is reasonable application of Batson); id. at 22-30 (Holloway's improper *pro se* supplemental brief did not serve to exhaust the Batson claim on direct appeal).

Holloway's argument that the Commonwealth was obligated to frame an additional, separate challenge to the Third Circuit's application of *de novo* review makes no sense.

Holloway's long, one-sided discussion of the merits, *Response* at 19-27, is another attempt at misdirection. He argues his case as if it had never been rejected by the state supreme court, or even by the district court. He does not mention that almost *none* of this evidence was presented to the state courts, or that Holloway completely failed to develop the record until he came to federal court. He does not even hint at the real issue – whether the state court's contrary view of the merits, based on the record before it, was *unreasonable*. Instead, he tries to create a cloud of misconduct and error that will sweep away any obstacles to relief.

But Holloway's broad discussion of the merits is selective, misleading, and often downright false. He claims, for example, that the prosecutor "gave no reason at all" for eight of his peremptory challenges, *Response* at 21; he entirely fails to mention that (1) the trial court *rejected* the claim without requiring the prosecutor to give any explanations; and (2) Holloway failed *for years* to ask for a Batson hearing, or to supplement the record at all, even when he had the opportunity to present evidence on collateral review. Now, of course, it is too late, both because the federal habeas statute prohibits further factual development where the petitioner failed to develop the facts in state court,

28 U.S.C. § 2254(e)(2), and because the prosecutor is now dead and cannot defend himself.[4]

Perhaps the most maddening part of Holloway's discussion of the merits is his insistence, repeated again and again, that the Commonwealth "conceded" at oral argument in the Third Circuit that Holloway had shown a *prima facie* case of discrimination. *Response* at 19, 21, 22, 23, 27. This is *false*. The Commonwealth argued that the state court could not have found a *prima facie* case from the evidence that was actually in the record. The Commonwealth also argued, with respect to the new evidence introduced in federal court, that (1) this evidence never should have been admitted, because Holloway had failed to present it to the state courts, and (2) even with all this new evidence, a court could have rejected the presence of a *prima facie* case. The Commonwealth filed a post-argument statement (which was accepted by the Court of Appeals) in which it specifically stated that it *did not concede* the existence of a *prima facie* case, for the same reasons. See Holloway v. Horn, No. 01-9009 (3d Cir.), Docket Entries of November 24 and 25, 2003; Clarification Statement at 1-2. Throughout the lengthy briefing in this case, the Commonwealth consistently defended the district court's holdings, including that there was no *prima facie* case of discrimination. Commonwealth's Second Step Brief, Nos.01-9009 and 01-9010, at 55-59, 65-84. The Third Circuit obviously did not think this was a

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[4] At the time of the district court's decision, the trial prosecutor, Drew Barth, had become psychologically disabled and was unable to testify. App. 138. He has since died.

conceded point – that is why the court explored the issue in depth and made a finding that Holloway had made a *prima facie* showing, rather than simply noting the Commonwealth's "concession." App.30-33.

Apart from his peculiar assertion that the Commonwealth has not challenged the Third Circuit's decision to invoke *de novo* review, and his misleading and incomplete discussion of the merits, Holloway makes several additional procedural arguments that are rather difficult to understand. He insists that the Commonwealth has "not challenged" either the Third Circuit's holding that "there was no adequate bar to federal review," or its holding that his Batson claim was "exhausted both on direct appeal and in state post-conviction proceedings." *Response* at 7 (emphasis omitted).

It is easy to see why these complaints do not matter. It is indisputable that the Pennsylvania Supreme Court addressed the Batson claim, on collateral review, as it rejected Holloway's claim of counsel's ineffectiveness. The state court's Batson decision *must* be taken into account, whatever procedural arguments Holloway's counsel might conjure. This is a matter of statutory language. The habeas statute requires that the writ *not be granted* unless the state court's adjudication was an unreasonable application of, or contrary to, this Court's precedent. 28 U.S.C. § 2254(d)(1). Even if Holloway's complicated procedural analysis were entirely correct, he *still* must show that the state court's adjudication of the Batson claim fails the deference test.[5]

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[5] This Court has explained that where a state court disposes of a claim on both procedural and substantive grounds, both

(continued ...)

Holloway never responds to this point; he attempts to direct this Court's attention away from the obvious issues, and into the procedural cul-de-sac of his own creation. He does briefly assert (without much argument) that the state court did not "adjudicate" the Batson claim, because its record-making requirement was procedural rather than substantive. *Response* at 4, 18. In the *Petition*, as part of the first *certiorari* question defending the Pennsylvania record-making requirement, the Commonwealth explains that actually this was a substantive ruling, but even if it were procedural, it was fully adequate. *Petition* at 12-14 & n.6. The Commonwealth will not repeat that analysis here. It is worth noting, however, that Holloway completely fails to acknowledge that he had every opportunity to preserve his

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grounds must be assessed independently, to the extent possible, in later federal habeas review. Harris v. Reed, 489 U.S. 255, 264 n.10 (1989)(independent, alternative state procedural ruling must stand even where state court was wrong on merits); see also Holland v. Jackson, 124 S. Ct. 2736 (2004) (*per curiam*) (where state court rejected claim both on procedural grounds and on the merits, federal habeas court must analyze *both* holdings independently). If the state court's procedural analysis is found to be invalid by a federal court, its alternative substantive holding also stands on its own and must be assessed under the deferential habeas standard. Otherwise, state courts would have every incentive to avoid reliance on procedural rules, for fear that an invalid procedural disposition would also wipe away any alternative substantive ruling.

claim on collateral review. He had an evidentiary hearing, but he did not even *try* to introduce any evidence to comply with Pennsylvania's record-making requirement, even though he (or his counsel) obviously knew about the record-making requirement by then. Since the "adequacy" inquiry is ultimately about safeguarding the claimant's *opportunity* to make constitutional claims, that ends the matter – Holloway had every chance to make the record, but he chose not to do so.

In one of Holloway's other procedural arguments, he relies on the Third Circuit's "no procedural default" holding. This holding arises from a slip-of-the-tongue mistake by the Pennsylvania Supreme Court, which stated that Holloway had not raised the Batson claim in the lower court during collateral review – when, in fact, he had raised it in the lower court but not on *direct appeal*. This error did not change the analysis of the claim at all.[6] Furthermore, this argument

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[6] This brief mistake appears in the state supreme court's 1999 decision. See Commonwealth v. Holloway, 739 A.2d 1039, 1044 (Pa. 1999). This error did not change the state supreme court's ineffectiveness analysis, which, after all, was based on its rejection of the underlying Batson claim. 739 A.2d at 1045. The Commonwealth has never relied on, or tried to enforce, this supposed never-raised-in-the-lower-court default. Indeed, no one even mentioned this mistake until Holloway raised it in his briefing before the Third Circuit. Despite Holloway's urging, this inconsequential drafting error does not give the federal courts license to ignore *everything* the state court actually said about the Batson issue.

leads Holloway into a predicament. He pretends that the Third Circuit's default holding – which takes up a total of one page of its opinion – freed it to entirely ignore everything else done in state court. But the Third Circuit did *not* ignore everything else. If Holloway is right, then all of the Third Circuit's subsequent discussion of exhaustion, and the state record-making requirement, and other points relating to the state proceedings – the lion's share of the opinion below – was all *dicta*. The Third Circuit obviously did not think it was *dicta*. See, e.g., App. 14 (after default holding, Third Circuit states "We *must* next determine whether Holloway exhausted state court remedies") (emphasis added).[7] Furthermore, even if Holloway is entirely correct and the Third Circuit wrote a mostly irrelevant advisory opinion, the same fundamental problem remains – the state courts actually decided the Batson claim, and under the habeas statute that decision must be deferred to unless it was somehow contrary to Batson.

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[7] The notion that most of the opinion below is *dicta* represents a stark about-face by Holloway's lawyers. The same institutional counsel who represent Holloway in this matter, and who represent virtually all death-sentenced Pennsylvania prisoners in federal habeas proceedings, have strenuously argued to local federal courts that these portions of the Third Circuit's opinion are *binding precedent*. See Rivers v. Horn, No. 02-1600 (E.D. Pa.), Petitioner's Response to the Commonwealth's Response to Petitioner's Reply, at 24 (habeas relief "required" under Third Circuit's Holloway decision because state court relied on same Batson record-making requirement invalidated in Holloway).

In sum, Holloway attempts to convert this case into an impenetrable mess – but he obscures the real issues, which are very real, easily identifiable, and quite disturbing. The Third Circuit has invalidated Pennsylvania's Batson record-making requirement, which has been one of the primary means by which Pennsylvania appellate courts have managed Batson claims over the years. The Third Circuit has also declared irrelevant large categories of evidence upon which the prosecution (and other litigants accused of Batson-style discrimination) commonly rely.[8] Finally, the Court of Appeals has substituted its own view of state procedure – that capital defendants could file otherwise improper *pro se* supplemental briefs in the Pennsylvania Supreme Court – for that of the actual Pennsylvania Supreme Court, which never

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[8] Holloway argues that the Third Circuit did not mean what it said about certain kinds of evidence being irrelevant to Batson – specifically, the race of jurors accepted by the prosecutor but challenged by the defense, or the race of jurors accepted by the prosecutor and ultimately seated by the jury. *Response* at 27-30. The Commonwealth stands by its earlier analysis of these holdings. Simply put, the Third Circuit explicitly refused to *consider* these facts despite the Commonwealth's presentation of them. See App. 42-43 ("The final composition of the jury … offers no reliable indication of whether the prosecution intentionally discriminated…"; "defense strikes are irrelevant to the determination of whether the prosecution has engaged in discrimination…"). Even if *de novo*, non-deferential review were appropriate, the Third Circuit's decision should be reversed on that basis alone.

announced such a rule.[9] These are not "trivial" matters, and they are not somehow insulated from review by the absence of several additional *certiorari* questions.

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[9] With respect to the Third Circuit's holding that Holloway's late, improper supplemental *pro se* brief exhausted his Batson claim on direct appeal, the Commonwealth will continue to rely on the discussion in its *Petition*. *Petition* at 22-30. Significantly, Holloway does not even dispute that he *never mentioned* this *pro se* brief during all the subsequent years of state court litigation, or during the voluminous briefing before the district court. Nor does he dispute that his failure to mention the *pro se* brief in his pleadings before the district court was a clear violation of Local Rule 9.4(2)(b) (habeas petition filed by death-sentenced prisoner "must identify at what stage of the proceedings each claim was exhausted in state court ...").

CONCLUSION

For the reasons set forth above, as well as the reasons given in their initial brief, petitioners respectfully request that this Court grant the Petition for Writ of *Certiorari*.

Respectfully submitted,

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